

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7339 & 75-7350

United States Court of Appeals

For the Second Circuit.

MICHAEL CASTELLANO,
Plaintiff-Appellee,

v.

RUDOLPH A. OETKER, "POLARSTEIN,"
Defendant-Appellee-Appellant.

RUDOLF OETKER,
Third-Party Plaintiff-Appellee-Appellant,

v.

BAY RIDGE OPERATING CO. INC. and STANDARD
FRUIT & STEAMSHIP CO.,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

Reply Brief of Third-Party Defendant-Appellant
Standard Fruit & Steamship Co.

SERGI & FETELL

Counsel to

JOHN J. LANGAN

Attorney for Third-Party Defendant-
Appellant, Standard Fruit &
Steamship Company

44 Court Street

Brooklyn, N. Y. 11201

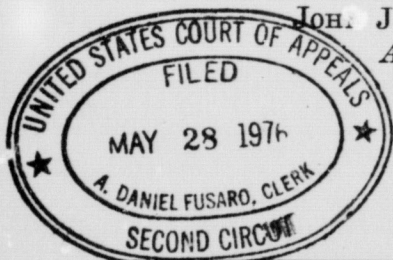


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On Appeal from the United States District Court for the
Eastern District of New York.

**Reply Brief of Third-Party Defendant-Appellant
Standard Fruit & Steamship Co.**

POINT I.

Reply to plaintiff's opposing brief.

Plaintiff has cited general propositions of maritime law which are essentially correct. What plaintiff has neglected to do is to point to those portions of the

record which demonstrate that *factually* plaintiff has made out a prima facie case. The plaintiff's brief suffers from the same infirmity as does the trial record, namely, general allegations unsupported by factual testimony.

POINT II.

Repy to brief of third-party defendant-appellee-appellant Bay Ridge Operating Co., Inc.

The brief of Bay Ridge Operating Co., Inc. is an anomaly. Bay Ridge avers (Brief, p. 3):

"Bay Ridge concurs in the argument made by Standard and Oetker for reversal of that part of the judgment granting recovery to plaintiff, and will not repeat them here."

The foregoing to the contrary notwithstanding, Bay Ridge has substituted itself for the plaintiff, and has made an argument which actually supports the plaintiff's verdict.

This anomaly is easily explainable on economic terms. In the present posture of a judgment herein, Bay Ridge is called upon to pay the sum of \$37,500 plus interest plus counsel fees to shipowner's attorneys. In the event of a recovery by the plaintiff, Bay Ridge will recover a compensation lien in the sum of \$2,100 for a net cost to Bay Ridge of \$28,400.

On a straight economic basis, it behooves Bay Ridge to support the judgment against plaintiff, provided of course that this court affirms the division of plaintiff's recovery so that the limit of Bay Ridge's exposure is only \$37,500 plus.

In taking this position, and attempting to support affirmants of the plaintiff's judgment, Bay Ridge has made some misstatements of fact.

a) The boxes which fell from the conveyor.

Bay Ridge avers:

"But plaintiff Castellano's testimony, while it may have been confusing in some parts, did include a categorical statement that he saw other *boxes* falling from the conveyer belt at the same time the box which fell struck him (57A)."

This is a mis-citation of the record. Plaintiff did not categorically state that he saw other *boxes* falling, he categorically stated that he saw a *box* fall and used the following language:

"Q. When did you see the case of bananas? A. When I got struck on the head, I see a *box* fall, I started to fall down.

"Q. You saw *the box* fall? A. After I got hit on the head.

"Q. After it hit you on the head, you say it fell on the floor? A. I see something fall down, a *box* falling alongside of me.

"Q. Isn't it true, Mr. Castellano, that after the *box* hit you as your lawyer, Mr. Bushlow, indicated, you were stunned and you didn't see anything? Isn't that right? A. Once I got hit on the head, so I started stumbling, but I see *boxes* fall in front of me.

"Q. There were other boxes there too, they were still working? A. No, that was clean that area.

"Q. And it hit you on the head and you were stunned? A. Yes.

"Q. And you looked down and there was a *box*, is that right? A. It's not that way.

"Q. Did you ever see where *that box* came from before it hit you? A. No." (Italics added.)

This certainly is not a catagorical statement that he "saw other boxes falling from the conveyer belt at the same time that the box which fell struck him."

Bay Ridge avers (Brief, p. 9): that Salvatore testified that "he saw boxes of bananas fall from the belts many times." We will not reiterate Salvatore's testimony, it is covered in our main brief herein, and amply in the stenographer's minutes which are in the Appendix. Suffice it to say that Salvatore clearly did not support any testimony which would lead to a finding that there was a continual fall of boxes by reason of a defect in the conveyer belt, which defect was attributable on a liability basis to Standard.

It is most respectfully urged that in assessing the arguments contained in the brief of plaintiff as appellee and the brief of Bay Ridge, as appellee, their economic interests must be assessed.

CONCLUSION.

The judgment below should be reversed.

Respectfully submitted,

SERGI & FETELL,
Attorneys for Third-Party Defendant-
Appellant,
STANDARD FRUIT & STEAMSHIP CO.

LESTER E. FETELL,
Of Counsel.

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, 197 KIRLIN, CAMPBELL & KEATING

Attorney for

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C. J. Keating
Attorney for *280 1st St - 1000 1st St*
Keating

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of *May*, 1976

James B. Bucklow
Attorney for